Filed 7/8/19 In re J.M. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re J.M., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. J.M., Defendant and Appellant.	F077915 (Tulare Super. Ct. No. JJD070959) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tulare County. Juliet Boccone, Judge.

Carol A. Koenig, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Kimberley A. Donohue, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

[*] Before Levy, Acting P.J., Poochigian, J. and Detjen, J.

On October 7, 2017, Officer Gamache was informed that a gray Dodge vehicle had been involved in a hit-and-run and was subsequently seen driving erratically. Gamache tried to effect a traffic stop, but the vehicle sped away. Gamache later responded to a traffic accident, which apparently involved the same Dodge vehicle. Several females ran from the vehicle, including appellant. Gamache chased them for more than 100 yards before eventually locating two of the females – including appellant – and arresting them. Appellant was not the driver of the vehicle.

Wardship Petition & Jurisdiction Hearing

The Tulare County District Attorney filed a juvenile wardship petition (Welf. & Inst. Code, § 602, subd. (a)) alleging appellant resisted, obstructed or delayed a peace officer (Pen. Code, § 148, subd. (a)(1).) Appellant was 16 years old.

A jurisdictional hearing was held on May 31, 2018, and the court found the allegation true beyond a reasonable doubt.

Probation Report

A probation report was filed June 25, 2018. The report indicated that appellant admitted she was intoxicated and under the influence of marijuana on the day of the incident. Appellant began drinking alcohol at age 14, using marijuana at age 13, and takes sleeping pills daily. She said she is not disciplined at home and does not have a curfew. She suffers from depression and suicidal ideations. Appellant believed she should not get any "sanction" from the court because she did not commit a crime.

Appellant's mother said they have a good relationship but do not communicate much. Appellant's mother does not discipline appellant, nor does she give her responsibilities.

The probation officer initially considered recommending to the court that appellant be placed in a group home, foster home, or with a suitable relative. However, the probation officer ultimately decided against making such a recommendation. Instead, the probation officer recommended appellant be placed on informal probation with

conditions, including a requirement that she have no contact with her "co-participant" Christopher E.[1]

Disposition Hearing

At the disposition hearing on July 17, 2018, the court declared appellant a ward of the court, placed her on probation with terms and conditions, ordered her placed on home supervision, and required that she perform 40 hours of community service. Among the terms of probation was the following: "The minor shall submit to a search of his/her electronic devices at any time, day or night, with or without a search warrant, with or without his/her consent, by any Peace Officer or Probation Officer."[2] The purpose of the condition was to ensure appellant did not have contact with Christopher E.[3]

Appellant did not lodge any objection to the electronic search condition. She now appeals the juvenile court's orders on the grounds the electronic search condition was improperly imposed.

DISCUSSION

I. Appellant's *Lent* Challenge was Forfeited by Failing to Object Below

Appellant argues that her electronic search condition was improper under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*). In *Lent*, our high court held that a probation condition is valid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not itself criminal, and (3) requires or forbids

---

[1] A probation report lists Christopher E. as a "co-participant" in the incident. However, as appellant argues, the record does not shed light on appellant's relationship to Christopher E., or why he was singled out for the no-contact order.

[2] The propriety of an electronic search condition is at issue in several cases under review at the Supreme Court, including *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted February 17, 2016, S230923.

[3] A separate condition of appellant's probation was that she not "knowingly and purposefully associate with or have contact in person, in writing, by telephone or electronic means, or directed through a third party with co-participant(s) Christopher [E.]."

conduct which is not reasonably related to future criminality….' [Citation.]" (*Id.* at p. 486, fn. omitted.)

A. Appellant Forfeited Her Lent *Challenge to the Probation Condition by Failing to Object*

An appellant must have timely challenged a probation condition on *Lent* grounds in the trial court; otherwise the claim is forfeited. (See *People v. Welch* (1993) 5 Cal.4th 228, 237.) Appellate decisions that have concluded otherwise have been expressly disapproved by the Supreme Court. (*Ibid*.)

When an appellant mounts a *facial* challenge to a probation condition, the asserted error is a pure question of law. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888 (*Sheena K.*) In that circumstance, the challenge is not forfeited by failing to object. However, this exception only applies to claims that present a pure question of law. Challenges that do not present a pure question of law are subject to " ' "[t]raditional objection and waiver principles" ' " which " ' "encourage development of the record and a proper exercise of discretion in the trial court. [Citation.]' [Citation.]" (*Id.* at p. 889.)

Here, appellant's *Lent* challenge does not present a pure question of law and therefore her failure to object forfeits the issue. In arguing that there is no relationship between the electronic search condition and the circumstances of the crime, appellant argues "[n]othing in the petition, nor any of the reports indicate that a cell phone or other electronic device was used in the commission of the crime." In arguing that the condition is not reasonably related to future criminality, appellant argues that the record does not provide information about whether she had "any other relationship" to Christopher E., "any history of contact with him," "why he was singled out for the no-contact order," whether she "had ever contacted him electronically or even had the means to do so," or whether the "use of electronics was involved or that past use of electronics furthered or contributed to any criminal activity on the minor's part."

As these contentions clearly show, appellant's *Lent* challenge does not present a pure question of law. Moreover, the lack of information in the record on these issues is precisely why objections are required at the juvenile court level. Such objections " ' "encourage development of the record." ' " (*Sheena K.*, *supra*, 40 Cal.4th at p. 889.) Appellant cannot fail to object and then benefit from the resultant lack of record development.[4]

B. Appellant has not Established Ineffective Assistance of Counsel

Appellant claims her counsel rendered ineffective assistance in failing to object to the electronic search probation condition.

" ' "To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. [Citation.]" ' " (*People v. Rices* (2017) 4 Cal.5th 49, 80.)

" 'In the usual case, where counsel's … strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions.' [Citation.]" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1051.) When the record does not reveal whether counsel had a plausible tactical reason for the decision at issue, the claim must be rejected on appeal. (See *People v. Carter* (2003) 30 Cal.4th 1166, 1223.)

Appellant's sole argument on this point is that since "the issue of validity of electronic search probation conditions is currently pending before the California Supreme

[4] For this reason, we decline to exercise any discretion we may have to disregard the forfeiture.

Court, there could be no reasonable tactical basis for trial counsel's failure to object." Not so.

The juvenile court made clear that it did not want appellant associating with Christopher E. The electronic search condition was one means the court employed to that end. Counsel could have reasonably concluded that if the electronic search condition was taken off the table, the court would have considered other avenues for ensuring there was no contact with Christopher E. Reports indicated that appellant's mother did not communicate with her, and did not enforce curfew, discipline, or responsibilities in the home. As a result, probation initially considered recommending that appellant be placed in a group home, foster home, or with a suitable relative. Ultimately, the probation officer did not recommend that disposition, instead recommending probation with conditions including no-contact with Christopher E. However, counsel could have concluded that if he successfully objected to the electronic search condition, the court may have considered other options to ensure appellant did not contact Christopher E., such as placing appellant in a group home. Counsel could have reasonably concluded that such a disposition would have been less favorable to his client than the search condition. Because there are conceivable reasons counsel would decline to object to the electronic search condition, we cannot find ineffective assistance of counsel on direct appeal.

II. We Reject Appellant's Claims the Search Condition was Unconstitutionally Vague and Overly Broad

Appellant claims the electronic search condition is unconstitutionally vague and unconstitutionally overbroad. We conclude appellant forfeited her claim of overbreadth by failing to object below. We conclude appellant's vagueness claim is cognizable on appeal without objection below, but that it ultimately lacks merit.

A. Appellant Forfeited her Claim the Search Condition was Unconstitutionally Overbroad

When a constitutional challenge to a probation condition presents a pure issue of law, it may be reviewed on appeal without objection in the trial court. (See *Sheena K., supra*, 40 Cal.4th at pp. 887–889.) For example, if an appellant mounts a " 'facial challenge' " to the phrasing of a probation condition because it does not contain a knowledge requirement, that claim may be reviewed without objection below. (*Id.* at p. 885.) However, when a constitutional challenge to a probation condition does *not* present a pure issue if law, an objection is required. (*Id.* at p. 889.)

A brief review of appellant's overbreadth claim shows that it is not a facial challenge presenting a pure question of law. Appellant argues that "[w]hile the reason for the search [condition] was to ensure her compliance with the probation condition that she not be in contact with Christopher [E.], the condition was not tailored to verify only that; rather it allowed a search of any electronic data or device in her custody or under her control and any content therein." Appellant says that if the condition is not stricken, it could be modified to permit only searches of "text messages and telephone numbers wherein the name Christopher [E.] appears as a sender or recipient." Appellant then acknowledges the obvious shortcomings of this approach in ascertaining whether she has been contacting Christopher E.

Because appellant's overbreadth claim is not a facial challenge presenting a pure question of law, it was forfeited by failing to object below.

B. Appellant's Claim the Electronic Search Condition is Unconstitutionally Vague Lacks Merit

Appellant separately argues the search condition is unconstitutionally vague. We conclude that this contention is not forfeited by failing to object because it is a "facial" challenge to the phrasing of the condition. However, we conclude that it lacks substantive merit.

Appellant argues the search condition is vague because it "fails to define" whether it encompasses "just data stored on electronic devices themselves" or whether it also includes "electronic accounts, such as social media accounts or cloud data that, while not stored on electronic devices, can be accessed through them." We see no vagueness. The condition provides that, "The minor shall submit to a search of his/her electronic devices at any time, day or night, with or without a search warrant, with or without his/her consent, by any Peace Officer or Probation Officer." The condition clearly allows a search of appellant's electronic devices, without limitation on the type of information such a search would yield. A search of appellant's electronic devices could (and likely would) yield information about appellant's "social media accounts or cloud data."[5] Information about appellant's social media accounts would be highly relevant in determining whether she has been communicating with Christopher E. through those accounts.

Appellant makes another argument that purportedly concerns vagueness, but actually concerns breadth. She argues that "electronic devices" is a vague term because it could be "interpreted" to include "cell phones, iPods, tablets, computers, electronic reading devices, data storage devices, gaming consoles, televisions, cameras, smart speakers and displays like Alexa and Echo devices, and a wide variety of appliances." But no interpretation is necessary; the term "electronic devices" clearly does include the devices appellant lists. The fact that the term covers a wide array of devices does not speak to vagueness, but to breadth.

DISPOSITION

The juvenile court's orders are affirmed.

---

[5] The condition would not allow law enforcement to obtain appellant's electronic data directly from a social media company. That would not be a search of appellant's "electronic *devices*."